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IN THE

Supreme Court of the United States

October Term, 1961.

No. 282.

ATLANTIC AND GULF STEVEDORES, INC.,
Petitioner,

v.

ELLERMAN LINES, LTD.
and
THE CITY LINE, LTD.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Reply Brief for the Petitioner.

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ARGUMENT.

I. Petitioner Has Properly Raised a Constitutional Issue Under the Second Provision of the Seventh Amendment.

The argument of Respondent that this case does not involve any constitutional question or any Seventh Amendment right to trial by jury is without foundation.

We have presented to this Court as to the Seventh Amendment solely the question of whether the decision of the Court below reversing a judgment entered upon the unanimous verdict of a jury violates the provisions of the Seventh Amendment which provides that ". . . no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law" there being no rule of law making such a finding by the jury improper. (See First Point, Petitioner's Brief, p. 13 et seq.) No issue is here involved as to a denial of a jury trial.

A jury did try the facts in the instant case. No one ever challenged the right to have the case tried to a jury and Respondent does not deny the propriety of this case having been tried to a jury (See Respondent's Brief, p. 8).

Plaintiff demanded a jury trial (R. 5a). Respondent's Complaint against Petitioner incorporated Plaintiff's Complaint, including the demand for jury trial, by reference and made it part of its Complaint (R. 10a). A timely demand for jury trial having been made, all other parties in the action who were affected by the demand were entitled to rely thereon, and were not required to make a demand for issues embraced therein. The Plaintiff's demand for jury trial, once made, could not be withdrawn without consent of the parties (Rule 38(d) F. R. C. P.).

Respondent's attempted distinction created by its own language, between a so-called "Seventh Amendment jury trial" and a so-called "Rule 39 jury trial" is not valid or pertinent. Moreover, even if it was, for purposes of argu-

ment, a so-called "Rule 39 jury trial" that rule provides that it has "the same effect as if trial by jury had been a matter of right" (Rule 39(c) F. R. C. P.). The Petitioner's right to a trial by jury in the particular action involved cannot be disputed. Neither the Seventh Amendment nor the rules of procedure can create a right to trial by jury. The right to trial by jury is derived from the fact that the first Judiciary Act, which distributed the judicial power over maritime matters among the courts, contained (Section 9, 1 Stat. 76) a proviso "saving to suitors in all cases, the right of a common law remedy, where the common law is competent to give it". The proviso is now incorporated in slightly different form in 28 U. S. C. Sec. 1333. Then and now, suit could be brought by the Plaintiff seaman in personam in common law, providing requisite diversity existed. When so brought a right to trial by jury existed as a matter of right and still exists as a matter of right. *Leon v. Galceran*, 11 Wallace 185; *Doucette v. Vincent*, 194 F. 2d 834; *Williams v. Tide Water Associated Oil Co.*, 227 F. 2d 791, 793 (cert. den., 100 L. Ed. 834). An incident to the diversity jurisdiction based on the common law remedy saved to suitors by the Judiciary Act of 1789 as revised in Section 1333 of the current Judiciary Act is the right to trial by jury under the Seventh Amendment and the Federal Rules 38a. The suit here involved and tried by the jury was a civil action, based solely on diversity (R. 217) and involving as to the indemnity claim between Petitioner and Respondent solely common law rules of law. The right asserted by Respondent to indemnity was not maritime in character. Admiralty normally has no jurisdiction of the non-maritime features of the involved contract and the character of the litigant does not confer jurisdiction. Such jurisdiction must be found in the cause of action or the nature thereof: *Grant-Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469, 476, 66 L. Ed. 321, 324; *North Pacific SS Co. v. Hall Bros. Marine SS Co.*, 249 U. S. 119, 63 L. Ed. 510.

The *Porello* case does not decide otherwise, the Court there saying *"although admiralty jurisdiction over contracts partly maritime and partly non-maritime in nature is doubtful"* it would be unwise procedurally to sever them for purposes of litigation (p. 456 of 330 U. S.). See also *Pillsbury Flour Mills Co. v. Interlake SS Co.*, 40 F. 2d 439; *The Richard Winslow*, 71 F. 426, 428, where it is held that the breach of a contractual obligation which is not maritime may not be the subject of a suit in admiralty.

The foregoing observations are made in reply to Respondent's contentions in its first subdivision of argument. We do not intend to raise such issues not encompassed within the Petition for certiorari. We suggest instead that the maritime or non-maritime nature of the cause of action here involved is not pertinent to Petitioner's right to assert a violation of the second portion of the Seventh Amendment. The prohibition of that portion of the Amendment is intended to apply to all federal courts as to facts found by a jury in a court of record, wherever situated, and of whatever jurisdiction.

See *Justices of The Supreme Court v. U. S., ex rel. Murray*, 9 Wallace 274 (1870);
Chicago B. & Q. R. Co. v. Chicago, 166 U. S. 226, 242.

It is clear, from the cases just referred to, that the second clause of the Seventh Amendment which is involved in this proceeding, should be read as a separate "substantial and independent clause" not related to the trial by jury as provided for in the previous clause. Referring to *Parsons v. Bedford*, 3 Pet. 447, 448, this Court in the *Murray* case (*supra*) points out that Mr. Justice Story in delivering the opinion of the Court, referring to the second clause of the Amendment observed "that it should be read as a substantial and independent clause" and that it was a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner." and adds "The history of the Amendment confirms this

view." This prohibition as we have demonstrated in our Brief, the Court of Appeals violated.

Whether or not Petitioner was negligent or in breach of its contractual duty to the Respondent was a matter properly submitted to the jury and the jury verdict in its favor on these issues is amply supported by the evidence. The Court of Appeals erred in granting judgment of indemnity as a matter of law and should be reversed.

II. Respondent Failed to File a Motion for Directed Verdict as Required by Rule 50(b), and, Erroneously Assumes That the Lower Court Was Bound to Examine the Legal Issues Purportedly Raised.

The Brief for Respondent, in the argument presented under its second and third questions, assumes that the Respondent shipowner filed a motion for a directed verdict pursuant to Rule 50(b) of the Federal Rules of Civil Procedure as to Petitioner.

The fact is that no such motion under Rule 50(b) was ever filed by Respondent either as to the Petitioner or the Plaintiff in the action. No such motion is reflected in the docket entries (R. 1a-4a) and a thorough and exhaustive review of the original transcript fails to reveal that any such motion was made or filed with the trial judge. Respondent merely made an oral motion to dismiss Plaintiff's case (original record N. T. 527, 528) at the close of Plaintiff's case and renewed this motion only as to Plaintiff at the close of all the evidence (original record N. T. 1113).

As to Petitioner, Respondent relied, at all times, solely upon its point for charge #3 (R. 156a) which asked for binding instructions against the Petitioner if the jury should return a verdict in favor of the Plaintiff and against Respondent. After the trial which ended April 28, 1958, Respondent, on May 7, 1958, filed a motion for judgment notwithstanding the verdict or for a new trial (R. 3a) which the Court denied (R. 191a).

On the same date as the jury's verdict, to wit April 28, 1958, the trial judge entered judgment in favor of the Petitioner and against the Respondent.

It is now well settled that a Motion for judgment notwithstanding the verdict may be entertained only if the movant has made a motion for a directed verdict at the close of all of the evidence, and that a mere request for binding instructions in points for charge is not a substitute for compliance with Rule 50.

Budge Manufacturing Co. v. U. S., (CA 3rd 1960) 280 F. 2d 414;

Mutual Ben. Health & Acc. Assn. v. Thomas, 123 F. 2d 353.

See also: *Cone v. West Virginia Pulp & Paper Co.*, 330 U. S. 212, 91 L. Ed. 849.

Rule 50 requires that the Motion for a directed verdict be filed at the close of the evidence offered by an opponent and that such motion "shall state the specific grounds therefor" (Rule 50(a)). As heretofore noted, no such motion was filed at the close of Plaintiff's evidence or at the close of Petitioner's evidence, nor indeed at any time during the trial, either as to Plaintiff or Petitioner.

A Motion for judgment notwithstanding the verdict may be entertained only if the movant has duly made a motion for a directed verdict in accordance with Rule 50: *Mutual Benefit Health & Acc. Assn. v. Thomas*, 123 F. 2d 353 (CCA 8th 1941). Hence, a Defendant who fails to move for a directed verdict at the close of all the evidence cannot present to the trial court a question as to the legal sufficiency of the evidence to support a verdict for his opponent by a motion for judgment notwithstanding the verdict or raise the question on appeal: *Mooman v. Reading Co.*, (E. D. Pa. 1946) 66 F. Supp. 636, aff'd 156 F. 2d 678; *Aetna Casualty and Surety Co. v. Yeatts*, (CCA 4th 1941) 122 F. 2d 350; *Dickerson v. Franklin Nat. Ins. Co.*, (CCA 4th 1942) 130 F. 2d 35.

The reason why a Motion for a directed verdict is a prerequisite to a motion for judgment notwithstanding a verdict is well stated by Judge Gardner in *Mutual Benefit Health & Accident Assn. v. Thomas*, (123 F. 2d 353, 855). In the interest of brevity we refer to his excellent opinion without quotation here.

Since it is clear that no motion for directed verdict pursuant to Rule 50 was ever filed by Respondent, it was error for the Court of Appeals to consider the Respondent's right to judgment n.o.v. on any ground or to direct the District Court to enter judgment for Respondent.

For purposes of appeal, a motion for a directed verdict is necessary to raise the legal question of the sufficiency of the evidence or the propriety of the jury's findings. *Budge Mfg. Co. v. U. S.*, (*supra*).

When a party allows a case to go to the jury without challenging the sufficiency of the evidence *by a motion for a directed verdict*, the appellate court is powerless to review the sufficiency of the evidence to support the verdict. *Pruett v. Marshall*, 283 F. 2d 436, 438; *Southern Railway Company v. Miller*, 285 F. 2d 202, 206; *Rotondo v. Isthmian SS Co.*, 243 F. 2d 581, 582.

Where it is a party's contention that as a matter of law he was entitled to a verdict, nothing is present for consideration of the reviewing Court in the absence of a motion for directed verdict: *Strickland v. Perry*, 244 F. 2d 24, 25; *Harnik v. Lilley*, 167 F. 2d 159; *Home Ins. Co. of N. Y. v. Davila*, 212 F. 2d 731.

The importance of Rule 50 and compliance with its precise terms is forcefully demonstrated by the decision of this Court in *Johnson v. New York, New Haven & Hartford Railroad Co.*, 344 U. S. 48, 97 L. Ed. 77, where although the party had filed a Motion for a directed verdict at the close of the evidence under Rule 50 which was denied by the trial judge, *but did not*, in his subsequent motions, expressly request *"to have judgment entered in accordance with his motion for a directed verdict"* as required by Rule 50(b),

it was held that the Court of Appeals could not enter or direct the trial court to enter a judgment nothwithstanding the verdict.

In the instant case the Respondent not having filed a motion for directed verdict as against any parties obviously could not and did not comply with the requirement that he ask to have judgment entered in accordance with his motion for a directed verdict.

It is thus obvious that so much of Respondent's argument as is predicated on the erroneous assumption that he had filed a motion for directed verdict under Rule 50(b) must be disregarded.

The entire argument of Respondent, therefore, under its second and third questions presented must be disregarded since it mistakenly assumes that it filed an appropriate motion under Rule 50 and indeed incorporates this erroneous assumption into the statement of its questions presented. The fact is that no questions had been reserved for judicial determination pursuant to Rule 50 and the district judge was not charged with any duty to rule upon any motion for directed verdict and the court of appeals had no right to order a reversal.

Respectfully submitted,

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